IPREME COURT, U. S.

DEC 3 1968

JOHN F. DAVIS, CLERK

No. 707

In the

Supreme Court of the United States

OCTOBER TERM, 1968

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, M. A. ROSS, and W. H. WILKERSON,

Petitioners,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES P. REEDY
THOMAS J. McDONNELL
ANTHONY W. SUMMERS
888 Union Station Bldg.
Chicago, Illinois 60606
Attorneys for Respondent

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Reasons for Denying the Writ	5
Conclusion	10

CITATIONS

CASES

Brotherhood of Railroad Trainmen v. *Akron and B. R.R. Co., et al.*, 385 F.2d 581 (D.C. Cir. 1967), *cert. denied* 390 U.S. 923 (1968)	8
Brotherhood of Railroad Trainmen v. *Chicago River & Indiana R.R. Co.*, 353 U.S. 30	6
Elgin, Joliet & Eastern Ry. Co. v. *Burley*, 325 U.S. 711 (1945)	6-8
General Committee, B.L.E. v. *Missouri-K-T R.R.*, 320 U.S. 323 (1943)	6
Manning v. *American Airlines, Inc.*, 221 F.Supp. 301 (S.D.N.Y. 1963) *affirmed* 329 F.2d (2d Cir.), *cert. denied*, 379 U.S. 817 (1964)	8
Order of Railway Conductors v. *Southern Ry. Co.*, 339 U.S. 255 (1950)	6
Penn. R.R. v. *United States Railroad Labor Board*, 261 U.S. 72 (1923)	6
Slocum v. *Delaware, L. & W.R. Co.*, 339 U.S. 239 (1950)	6

PAGE

Southern Ry. Co. v. *Brotherhood of Locomotive Firemen and Engineers*, 384 F.2d 323, 327 6

STATUTES

Railway Labor Act, 45 USC §§ 151 et seq.:

§ 2, Seventh (45 USC § 152, Seventh) 2

§ 3, First (45 USC § 153, First) 2

§ 5, First (45 USC § 155, First) 2

§ 6, (45 USC § 156) 2

IN THE

OCTOBER TERM, 1968

SUPREME COURT OF THE UNITED STATES

No.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, M. A. ROSS, and W. H. WILKERSON,

Petitioners.

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 397 F. 2d 541.

The Findings of Fact, Conclusions of Law of the United States District Court for the Northern District of Illinois, per Napoli, J., are not reported but are presented in Petitioners' Appendix at pp. 9-14.

JURISDICTION

The judicial requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Should this Court grant certiorari to review the findings of the Court of Appeals that the facts of this situation are those of a "minor" dispute, one subject to compulsory arbitrarion procedures under the Railway Labor Act and to binding decision by the National Railroad Adjustment Board?

STATUTE INVOLVED

The statutory provisions of the Railway Labor Act involved are *Sections 2, First, Seventh; 3 First (i), 5, First and 6; (45 U.S.C. § 152, First, Seventh, 153, First (i), 155, First and 156) set forth on A. 19, 20, 21 and 22 in the Petition.*

STATEMENT OF FACTS

For years the interplay between the crafts of engineers and firemen, the promotion and demotion of engineers and firemen, their dual seniority rights, the ebb and flow or movement from the firemen's craft up to the engineers' craft and the reverse flow of the engineers to the firemen's craft, have been controlled by extensive, complicated and interrelated contract provisions.

The three parties to this dispute, the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Locomotive Engineers, and the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, decided on a variance of the method for handling this ebb and flow at Three Forks, Montana, and entered into the 1956 Agreement with the following Paragraph K:

"K. This agreement effective November 1, 1956, applies only on the East Rocky Mountain Seniority District, and is subject to cancellation on 30 days' written notice by any party signatory hereto."

This provision is no different than hundreds of other similar provisions in contracts outstanding in the railroad industry. The cancellation clause is the logical result of the wish of all the parties that if the Agreement did not cover the situation it could be cancelled and a reversion made to the existing Rules without undue delay.

On September 17, 1966 and September 27, 1966, the defendant, Brotherhood of Locomotive Firemen and Enginemen protested the cancellation of the aforesaid Agreement contending that the Agreement could not be terminated without the concurrence of all of the parties to the Agreement.

An action was commenced on October 10, 1966, by the Brotherhood of Locomotive Firemen and Enginemen resulting in a finding by the District Court for the Northern District of Illinois, Eastern Division, on February 2, 1968, that this was a major dispute. A Notice of Appeal to the United States Court of Appeals for the Seventh Circuit was filed on February 20, 1968.

The District Court also denied plaintiff-appellant's motion for an injunction pending appeal on February 21, 1968. Plaintiff-Appellant then filed a motion with this United States Court of Appeals for the Seventh Circuit for an injunction pending appeal. The motion was denied without prejudice on February 21, 1968, since there was no showing that a strike was imminent or threatened. On February 23, 1968, the BLE went on strike and

formed picket lines at certain of plaintiff-appellant's properties. Plaintiff-Appellant immediately filed a motion for reconsideration. This Court issued an injunction pending appeal against the BLE on February 23, 1968.

The United States Court of Appeals reversed and held:

> "In our opinion a dispute as to whether a termination of the 1956 agreement has the effect of restoring the engineers' extra board at Three Forks, and whether such a restoration constitutes a 'new' working condition, presents only issues which are to be resolved by reference to and interpretation of the related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. This is particularly true where a jurisdictional dispute over work assignments is involved. The rationale and teaching of *Transportation-Communication Employees Union* v. *Union Pacific Railroad Co.*, 385 U.S. 157, is pertinent in this connection. It was there pointed out (385 U.S. pp. 160-161):
>
> > "'A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 550; cf. *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192. ". . . (I)t is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate . . . The collective agreement covers the whole employment relationship. It calls into being a new common law--the common law of a particular industry or of a particular industry or of a particular plant." *United Steelworkers of America* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578-579. In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements,

> as well as the practice, usage and custom pertaining to all such agreements. This is particularly true when the agreement is resorted to for the purpose of settling a jurisdictional dispute over work assignments.'

"We therefore conclude that the dispute here involved is a minor dispute."

REASONS FOR DENYING THE WRIT

The Petitioners argue that this is a "major" dispute, not a "minor" one. The United States Court of Appeals in its opinion specifically held after a review of the facts that this matter was a "minor" dispute. The following definition of these two classes of disputes was applied to the facts before it:

> "The difference between 'minor' disputes, over which the National Railroad Adjustment Board has exclusive jurisdiction, and "major' disputes, the procedures for resolution of which are prescribed in § 6 of the Railroad Labor Act, 45 U.S.C. § 156, can be set forth succinctly: 'Major' disputes relate to the formation of new agreements or modification of existing agreements; 'minor' disputes relate to the interpretation or application of existing agreements. This distinction, however, like many others in the law, is more easily stated than applied. The problem, of course, is drawing the line between disagreements over contract terms and unilateral attempts to amend the agreement. If the railroad took action which it admitted was not in conformity with the existing agreement there would be no question that a 'major dispute' was involved; and the same result necessarily obtains where the railroad's claimed justification is without any reasonable basis in the contract *United Industrial Workers* v. *Board of Trustees,* 351 F. 2d 183 (5th Cir. 1965). But we think that, where the railroad asserts a defense based on

> the term of the existing collective bargaining agreement, the controversy may not be termed a 'major' dispute unless the claimed defense is so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by § 6 for alteration of existing agreements."
>
> *Southern Ry. Co.* v. *Brotherhood of Locomotive Firemen and Engineers,* 384 F. 2d 323, 327.

This is the same language in meaning and substance as that contained in the language of the Supreme Court in *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R.R. Co.,* 353 U.S. 30, and in the following cases: *Penn. R.R.* v. *United States Railroad Labor Board,* 261 U.S. 72 (1923); *General Committee, B.L.E.* v. *Missouri-K-T R.R.,* 320 U.S. 323 (1943); *Slocum* v. *Delaware, L. & W.R. Co.,* 339 U.S. 239 (1950); *Order of Railway Conductors* v. *Southern Ry. Co.,* 339 U.S. 255 (1950); *Elgin, Joliet & Eastern Ry. Co.* v. *Burley,* 325 U.S. 711 (1945), as well as numerous other cases.

The Petitioners complain that since it was judicially determined that the procedures of the Railway Labor Act should be protected for the benefit of all concerned and pursuant to the mandate of Congress when it passed the Railway Labor Act, the courts have been misled into enjoining strikes designed to destroy the procedure for determining the "minor disputes". The Respondent is accused of maneuvering a "major" dispute into a "minor" one. Whether or not this judicial determination is made depends not on what any party "maneuvers" but what the facts of the particular dispute are.

In this instance, these questions of fact were examined and the law applied with the finding that such *facts* (emphasis supplied) warranted a finding that this was a

minor dispute. There is a disagreement as to the application of the contract provisions to the set of facts, clearly a typical "minor" dispute. An interpretation of the agreements, customs and practices making up the complete context of the dispute is involved. It is submitted that it may be worthwhile to consider that the courts are not extending the "minor" disputes doctrine but rather that the Brotherhoods are attempting to use their economic muscle rather than go before the N.R.A.B. which has the power to finally decide the question.

The Petitioners claim, "as a last minute effort to convert this dispute into a minor dispute, the carrier submitted an issue to the N.R.A.B." In other words the mere filing of a "submission" before the N.R.A.B. changes the dispute from "major" to "minor". This is not true. Again the facts of a given controversy determine the type of dispute involved. Witness the number of cases where this determination was made by Courts of Appeal and the Supreme Court of the United States. In addition to this claim, the Petitioners by innuendo and footnote suggest that the Respondent is seeking delay—"7 years"—by filing a submission before the National Railroad Adjustment Board.

The Respondent stipulated that there was a probable delay of seven years before the N.R.A.B. but in the trial court and in the Court of Appeals, the Respondent indicated not once but several times its willingness to go before a "special" board or a "public law" board where this question could be finally determined within not more than five months. The action of the Respondent is clearly not designed to delay.

Petitioner argues further that the Mediation Board determined that this was a "major" dispute and the

determination was binding on the parties. This is said in the face of the Board's interpretation of its own function. *Rules and Regulations,* issued September 11, 1946 (11 F.R. 177A-921) and supplemented May 10, 1947 (12 F.R. 3083), and the holding of the court as to the purposes and function of the N.M.B. in *Elgin, Joliet & Eastern R.R. Co.* v. *Burley,* 325 U.S. 711 (1945) where the Court said:

> "For their (major disputes) settlement, the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation . . . the parties are required to submit to the successive procedures designed to induce agreement. But compulsions go only to insure that those procedures are exhausted." P.725

It went on to say:

> "The procedure adopted (by the NRAB) is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board. Another tribunal of very different character is established with 'jurisdiction' to determine grievances and make awards concerning them. The entire statutory procedure for settling major disputes is aimed only at securing agreement and not decision, unless the parties agree to arbitration . . ." P.727

The final contention of the Petitioners, as it was in the Court of Appeals, is that *Manning* v. *American Airlines, Inc.,* 221 F. Supp. 301 (S.D.N.Y. 1963) *affirmed* 329 F. 2d (2d Cir.)), *cert. denied,* 379 U.S. 817 (1964) governs this citation. There is one addition and this is the *Brotherhood of Railroad Trainmen* v. *Akron and B.R.R. Co. et al.,* 385 F. 2d 581 (D.C. Cir. 1967), *cert. denied* 390 U.S. 923 (1968), case which they say is wholly based on *Manning,*

supra. The factual situations of both of these cases are entirely different from the matter before the court. In *Manning,* the flight engineers and the Airline had a "basic" or "master" agreement and a related "check off" agreement, neither one of which or both comprised a part of an over-all complex, involved system of contract provisions, customs and practices governing the "ebb" and "flow" of personnel. The "master" agreement specified a change only in accordance with Section 6 of the Railway Labor Act and the related "check off" agreement could be renewed only by mutual agreement.

In *Akron* there was a law enacted to solve one specific problem. It set up a board with authority to finally decide one particular question. The railroads sought to eliminate certain members of train crews. The Unions disputed this contract change. Congress, through the board it set up, decided the issue. A completely different set of facts than are involved here. The Court of Appeals, in deciding the question of the effect of this Act of Congress, said in part:

> "What we are in effect holding is that since Public Law 88-108 is silent as to the applicable rule, the case is governed by the combination of *undeniable physical facts* (emphasis supplied), plus the general legal rule of the Railway Labor Act." *Brotherhood of Railroad Trainmen* v. *Akron and B.R.R. Co., supra,* page 593.

The court emphasizes the "undeniable physical facts" and as the Respondent stated before the facts in this case are altogether different than those of either *Manning* v. *American Airlines, Inc., supra.* and *B.R.T.* v. *Akron B.B.R. supra.* The instant case involves "ebb" and "flow" and related subjects covered by basic agreements, which

the agreement of November 1, 1956, supplemented, and these agreements continued to govern the relationship of the parties when the cancellation pursuant to paragraph K took place. There remain questions as to interpretation and application of existing agreements which can only be answered by the National Railroad Adjustment Board or a Special Board set up by the parties.

CONCLUSION

1. This is a Minor dispute involving the interpretation and/or application of contract provisions.

2. The Mediation Board does not have the power to determine whether or not a dispute is "major" or "minor".

3. The final determination of the dispute is within the jurisdiction of the National Railroad Adjustment Board.

For these reasons, we respectfully suggest to this Honorable Court that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JAMES P. REEDY
THOMAS J. McDONNELL
ANTHONY W. SUMMERS
Attorneys for Respondent